



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5  
77 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590

Bob Newport

DEC 27 2001

REPLY TO THE ATTENTION OF:

WQ-16J

Robert Peacock  
Tribal Chairman  
Fond du Lac Reservation Business Committee  
105 University Road  
Cloquet, MN 55720

Dear Chairman Peacock:

The United States Environmental Protection Agency (USEPA) has completed its review of water quality standards submitted by the Fond du Lac Band of Lake Superior Chippewa (the "Band"). The standards were originally adopted into ordinance on December 10, 1998. USEPA worked with your staff to revise several areas of the standards, and the revisions were adopted into ordinance on September 11, 2001. EPA received the Band's revised set of standards on October 19, 2001 (hereinafter the "Water Quality Standards"). With this letter, we are taking final action on the Band's standards submittal and documenting our formal approval of the Water Quality Standards for the Fond du Lac Reservation, based on the record and the enclosed Record of Decision.

#### PROGRAM AUTHORIZATION

In order to obtain federal approval of the Water Quality Standards, USEPA must determine that the Band has met the requirements of 40 C.F.R. § 131.8, "Requirements for Indian Tribes to administer a water quality standards program." USEPA approved the Band's application for authorization to conduct a water quality standards program on May 16, 1996. USEPA Region 5 staff worked with Band staff during calendar year 2000 to clarify and update the list of water bodies on the Fond du Lac Reservation; the updated list of water bodies is reflected in Chapter 4 of the Water Quality Standards. With today's approval letter, the Band's Water Quality Standards become applicable to surface waters within the exterior boundaries of the Fond du Lac Indian Reservation.

#### CONSULTATION WITH U.S. FISH AND WILDLIFE SERVICE

USEPA is required to conduct Endangered Species Act (ESA) consultation with the United States Fish and Wildlife Service (USFWS) to determine if the Band's Water Quality Standards are likely to adversely affect threatened, endangered and candidate species potentially present on



Printed on Recycled Paper

the Reservation. Our original biological evaluation was submitted to USFWS for concurrence on April 12, 1999 with the determination that Fond du Lac's Water Quality Standards were "not likely to adversely affect" the five threatened, endangered and candidate species potentially present on the Reservation and that approval of the standards is expected to have a beneficial or benign effect on the endangered, threatened and candidate species potentially present. USFWS provided concurrence via telephone on June 23, 1999, and USEPA documented the response in a letter back to USFWS on July 23, 1999.

By letter dated November 1, 2001, USEPA submitted the revised Water Quality Standards to USFWS and offered an additional 30 days to comment. We are approving the Band's Water Quality Standards subject to the results of consultation under section 7(a)(2) of the Endangered Species Act. With our approval of the standards "subject to the results of consultation under section 7(a)(2) of the Endangered Species Act," USEPA retains the discretion to revise its approval decision if the consultation identifies deficiencies in the standards that require remedial action. Since the amended set of standards have only been strengthened by USEPA's suggested revisions, and there are no major changes in Federally-listed endangered, threatened and candidate species that were not already considered in the original consultation, USEPA anticipates that no further consultation will be required.

## PUBLIC PARTICIPATION

Before USEPA can approve a Tribe's water quality standards, the Tribe must document that formal public participation was sought in accordance with 40 C.F.R. Part 25. The Band met those requirements on the original set of standards during two open meetings on July 23, 1998. A responsiveness summary was prepared on November 30, 1998 summarizing comments from the State of Minnesota, USEPA, the Big Lake Association, and the Grand Portage Reservation.

Regarding the modifications requested by USEPA, The Fond du Lac Tribe addressed the public participation requirements on the amendments to the standards by holding an open forum for comment during a Reservation-wide health fair on June 22, 2001. Before the forum was held, copies of the amended standards were available for public review at three tribal community centers and the Cloquet Public Library. An amended copy of the standards was sent to the State of Minnesota as well. We were informed by your staff that there were no further public comments except those submitted by USEPA in a letter dated March 28, 2001. Another responsiveness summary, dated September 28, 2001, was prepared by your staff to address USEPA's concerns. The Band considered all public comments made during each meeting, revised the standards accordingly, provided written clarifications where needed, and provided justification for leaving certain sections of the standards as they were originally developed.



## USEPA APPROVAL AUTHORITY

USEPA has the authority to approve those sections of the Band's Water Quality Standards that are consistent with the requirements outlined in section 303 of the Clean Water Act (CWA), and Parts 131 and 132 under Title 40 of the C.F.R. We hereby approve the following sections of the Water Quality Standards which meet the minimum requirements specified in the CWA and implementing regulations:

- (1) Consistent with the CWA § 303(c)(2)(A) and 40 C.F.R. § 131.10 we approve the designated uses described in Chapter 3 Section 302, the designated uses applied to Reservation water bodies in Chapter 4, and the designated uses linked to numeric criteria in Appendices 1, 2 and 3.
- (2) Consistent with 40 C.F.R. § 132.4(a)(1), we approve the definitions in Chapter 2, Section 201.
- (3) Consistent with 40 C.F.R. § 131.20 we approve the Tribe's procedures for reviewing/revising water quality standards and for public participation as described in Chapter 1, Section 104, paragraphs 2 and 3.
- (4) Consistent with 40 C.F.R. §§ 131.11 and 132.3, we approve the numeric criteria and conversion factors listed in Appendices 1, 2 and 3, and the narrative and numeric criteria within Chapter 3 - with the exception noted at #3 below concerning the Band's narrative criterion for radioactive materials.
- (5) Consistent with 40 C.F.R. §§ 131.6(b) and 132.4(a)(2 - 5), we approve the methodologies for revising and developing aquatic life criteria, bioaccumulation factors, human health criteria and wildlife criteria that have been incorporated by reference into Chapter 3, Section 301(e)(1-7) except that the Band incorrectly placed the fish consumption rate within the aquatic life methodology, rather than within the human health methodology. [See discussion within the Record of Decision.]
- (6) Consistent with 40 C.F.R. §§ 131.12 and 40 C.F.R. 132.4(a)(6), we approve Chapter 1, Section 105, Antidegradation Policy and Implementation.
- (7) Consistent with the general policies requirement at 40 C.F.R §§ 131.13 and the implementation procedures requirement at 132.4(a)(7), we approve the site-specific criteria development and modification procedures in Chapter 7, and the mixing zones and variance procedures in Chapter 8.
- (8) Consistent with the general information requirement at 40 C.F.R. § 132.5(b)(4), we are approving Chapter 6 which describes how the Tribe intends to implement certain sections of the standards.
- (9) Consistent with the legal certification requirement at 40 CFR §§ 131.6(e) and 132.5(b)(2), we approve the Certification contained within Chapter 10.

USEPA's approval authority under section 303 of the CWA does not extend to the following areas of the Band's Water Quality Standards:

- (1) Chapter 9: Enforcement and Prosecution.
- (2) Chapter 10: Amendments (Section 1001), and Severability (Section 1002).
- (3) Section 301(i) includes a narrative criterion involving radioactive materials. For purposes of the CWA regulation, 40 C.F.R. § 122.2 defines "pollutant" to include radioactive materials *except* those regulated under the Atomic Energy Act (AEA) of 1954, as amended (42 U.S.C. 2011 et seq.). Radioactive materials covered by the AEA are those encompassed in its definition of source, byproduct, or special nuclear materials. The water quality criterion that the Band has adopted for radioactive materials is approved at #4 above, with an exception for radioactive materials that may be

source, byproduct, or special nuclear materials regulated under the AEA.

(4) Section 103 indicates that "The standards will be applied to waters on the Reservation which may impact the quality of waters upon, *under*, flowing through or adjacent to the Fond du Lac Reservation...." EPA's criteria were not designed to protect ground water and 303 Program Authorization does not convey authority to run a ground water protection program. Further, USEPA's approval applies only to water resources within the borders of the Fond du Lac Reservation.

## LEGAL CERTIFICATION

The original submittal of the Water Quality Standards included a December 22, 1998 certification from Peter Defoe, the Band's Secretary/Treasurer, that the Water Quality Standards were duly adopted pursuant to Fond du Lac Tribal governing procedures. 40 C.F.R. § 132.5(b)(2) requires a "Certification by the Attorney General or other appropriate legal authority...." In the revised set of standards, the Tribal Attorney Dennis Peterson signed the Band's certification that the fully revised set of water quality standards were duly adopted pursuant to the Tribe's governing procedures on September 11, 2001.

I would like to commend the Band for being the first Tribe in Minnesota, and only the second Tribe in Region 5, to adopt a federally approved water quality standards program to safeguard the quality of Reservation waters. I have enclosed, for your official file, the Record of Decision which documents that the Water Quality Standards are consistent with our statutory and regulatory requirements. If you or your staff have any questions regarding our final action to approve Fond du Lac's water quality standards, please contact Kathy Mayo of my staff at 312-353-5592 or by email at [mayo.kathleen@epa.gov](mailto:mayo.kathleen@epa.gov).

Sincerely,



Jo Lynn Traub, Director  
Water Division

Enclosure

cc: Chris Berini, Fond du Lac Tribe  
Nancy Costa, Fond du Lac Tribe  
Dan Stinnett, U.S. Fish and Wildlife Service